

## Permitting and Compensatory Mitigation

Compensatory mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Mitigation is considered throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses [33 CFR 320.4(r)(2)]. Construction of compensatory mitigation projects should be concurrent with authorized impacts to the maximum practicable extent. Advance or concurrent mitigation can reduce temporal losses of aquatic functions and facilitate compliance. After-the-fact mitigation may also be required for permits issued in emergencies or from an enforcement action.

**I. Mitigation Options.** Permittees within North Carolina currently have three compensatory mitigation options as follows:

**A. Project-Specific Mitigation.** This type of mitigation addresses impacts associated with a specific project. It generally consists of restoration, creation, enhancement, or preservation of aquatic resources, or a combination thereof, that is similar to the aquatic resources of the impacted area and is often located on the project site or adjacent to the impact area. Permittees providing project-specific mitigation have a Corps of Engineers approved mitigation plan detailing the site, source of hydrology, types of aquatic resources to be restored, created, enhanced, or preserved, success criteria, contingency measures, monitoring plan, annual reporting requirements, etc. The mitigation plan becomes part of the Section 404 authorization in the form of a special condition. The permittee is responsible for complying with all terms and conditions of the authorization and would be in violation of their authorization if the mitigation does not comply with the approved plan.

Project-specific mitigation should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site. If on-site compensatory mitigation is not practicable, off-site compensatory mitigation may be undertaken within the 8-digit hydrologic unit of the watershed in which the impact is located.

Project-specific mitigation should be in-kind as opposed to out-of-kind, providing or managing substitute resources to replace lost functions where such resources are also physically and biologically the same or closely approximate those lost.

Additionally, there is continued uncertainty regarding the success of wetland creation projects. Therefore, in determining the nature and extent of habitat development of this type, careful consideration is given to the likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

Simple purchase or preservation of existing wetland resources may in only exceptional circumstances be accepted as compensatory mitigation. Preservation may be acceptable in certain cases when coupled with other restoration, enhancement or creation work. On a case-by-case basis, the Regulatory Division will consider wetland preservation based on the following factors:

- Size of the area to be preserved
- Quality and/or uniqueness of the resource
- Proximity of the site to other public resources
- Degree to which the area performs important physical, chemical or biological functions, the protection and maintenance of which is important to the region where those aquatic functions are located
- Demonstrable threat to the resource

**B. Mitigation Banks.** Consistent with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, permittees have the option to purchase mitigation credits from an approved bank. Mitigation banks will generally be functioning in advance of project impacts thereby reducing the temporal loss of aquatic functions and reducing uncertainty over the ecological success of the project. Mitigation banking instruments are reviewed and approved by an interagency Mitigation Bank Review Team (MBRT). The MBRT ensures that the banking instrument appropriately addresses the physical and legal characteristics of the bank and how the bank will be established and operated. The bank sponsor is responsible for the operation and maintenance of the bank during its operational life, as well as the long-term management and ecological success of the project. A link to specific information regarding mitigation banks can be found at the top of this page.

**C. In-Lieu-Fee Mitigation.** For information regarding in-lieu-fee mitigation in North Carolina, please visit [http://www.saw.usace.army.mil/WETLANDS/Mitigation/in\\_lieu\\_fee.htm](http://www.saw.usace.army.mil/WETLANDS/Mitigation/in_lieu_fee.htm).

**II. Wetland Ratios.** The Regulatory Division is currently involved in an interagency initiative to develop a wetland function assessment methodology for use in North Carolina. However, it is likely that even when such a methodology is developed, there may be instances where acreage is used to determine wetland compensatory mitigation requirements. The following standard is designed to ensure that there is no net loss of wetlands. Until such time that a wetland function assessment methodology is developed, tested and approved, the Regulatory Division will base wetland mitigation calculations on acreage and utilize the following ratios when determining the scope of compensatory mitigation required for project impacts.

- Restoration 2:1
- Creation 3:1
- Enhancement 4:1
- Preservation 10:1 (In combination with appropriate restoration, enhancement or creation)

Ratios may be adjusted on a case-by-case basis depending on the type and quality of aquatic resource impacted, temporal lag in replacing lost functions, or the probability for success of a given mitigation proposal. For instance, the restoration ratio for bottomland hardwood wetlands will generally be a minimum of 3:1.

**III. Stream Ratios** The Regulatory Division is currently involved in an interagency initiative to develop a stream function assessment methodology for use in North Carolina. However, it is likely that even when such a methodology is developed, there may be instances where linear feet are used to determine stream compensatory mitigation requirements. Until such time that a stream function assessment methodology is developed, tested and approved, the Regulatory Division will base stream mitigation calculations on linear feet.

**IV. Preservation Mechanisms.** The wetlands, streams or other aquatic resources (including uplands when appropriate) associated with a mitigation site or bank should be protected in perpetuity with appropriate real estate arrangements. Such arrangements should effectively restrict harmful activities that might otherwise jeopardize the purpose and functioning of the mitigation project. These prohibitions include, but are not limited to: filling; grading; excavating; earth movement of any kind; construction of roads, walkways, buildings, signs, or any other structure; any activity that may alter the drainage patterns on the property; the destruction, mowing, or other alteration of vegetation on the property; disposal or storage of any garbage, trash, or other waste material; or any other activity which would result in the wetlands being adversely impacted or destroyed. Conservation easements are the preferred preservation mechanism.